

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

JANE DOE I, <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	
v.)	No. 4:08-cv-1518 CEJ
)	
CHRIS KOSTER, <i>et al.</i> ,)	
)	
Defendants.)	

REPLY TO REPOSE DEFENDANTS MCCULLOCH AND FITCH
TO MOTION FOR RECONSIDERATION

Plaintiffs offer this brief reply to the more outlandish claims in the response to their motion to reconsider filed by Robert McCulloch and Tim Fitch (Doc. # 224):

1. It is well-established that Plaintiffs need not wait to be arrested for violating an unconstitutional law before attacking its constitutionality. A review of Plaintiffs' declarations demonstrates that they made a good faith effort to comply with the challenged statute.

Although McCulloch and Fitch refer to "some of the Plaintiffs" as having "flouted" the statute's requirements, they could only be referring to the one plaintiff who was not in his home although he believed he had "just cause" not to be.

This very difference of opinion—a disagreement over whether Plaintiff John Doe IV had just cause to be absent or whether he "flouted" the law—neatly illustrates Plaintiffs' argument on the merits: the statute under consideration is vague. It also demonstrates that Plaintiffs are at risk of arbitrary enforcement absent injunctive relief.

As to the point that John Doe IV has not been prosecuted: it is not evidence that he need not fear prosecution this year. McCulloch and Fitch remain subject to the October 27, 2008

preliminary injunction that prohibits them from prosecuting alleged violations of R.S.Mo. § 589.426.1(1) and (2) occurring on October 31, 2008. They are not currently enjoined from prosecuting offenses on October 31, 2009 or thereafter.

2. Contrary to McCulloch and Fitch's attribution otherwise, Plaintiffs did not make any assertion about what Defendants had, or had not, asked this Court to defer proceedings under *Pullman*. Plaintiffs explained that less than one-third of Defendants opposed their second motion for preliminary injunction. (McCulloch and Fitch's claim that *all* Defendant have asked for abstention is, however, not accurate.)

3. The proposition that this Court may defer under *Pullman* and grant interlocutory relief is neither novel nor without citation to authority. *See Plaintiffs' Opposition to Motion to Abstain or Stay* at 4 (citing *Reproductive Health Services of Planned Parenthood of St. Louis Region, Inc. v. Nixon*, 428 F.3d 1139, 1148 (8th Cir. 2005); *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 312 n. 18 (1979); and *Harrison v. NAACP*, 360 U.S. 167, 178-79 (1959)).

4. McCulloch and Fitch's repeated assertion that Plaintiffs could have obtained relief long ago by proceeding in the case one of them briefly filed in Cole County remains fiction. As explained in Plaintiffs' Reply to those Defendants who opposed their second motion for preliminary injunction, Plaintiffs could not proceed in both this Court and the state court prior to *Pullman* deferral. The only Defendant in the Cole County case was the State of Missouri, which was represented, like Defendants Koster, Nixon, Corwin, and Keathley in this case, by the Attorney General. In the state court case, the Attorney General argued, in part, that the case should be dismissed because of the existence of this case. *See Mo.S.Ct. R. 5.27(g)(1)(F)*(including as grounds for dismissal "[t]hat there is another pending between the

same parties for the same cause in this state”). The point was well-taken. Absent the *Pullman* order entered on September 25, 2009, Plaintiffs were not permitted to proceed simultaneously in state and federal court on the same claims. (In addition, this Court should not give credence to the casenet docket posting appended to McCulloch and Fitch’s response. As indicated four times in the attached documents, they are “not considered an official court record.”)

ACCORDINGLY Plaintiffs respectfully request this Court reconsider its September 25, 2009 order pursuant to Fed.R.Civ.P. 54(B).

Respectfully submitted,

**AMERICAN CIVIL LIBERTIES UNION OF
EASTERN MISSOURI**

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served upon each of the Defendants listed below

by operation of this Court's ECF/CM system on October 15, 2009:

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